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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

*Amicus Curiae* the National Association of Criminal Defense Lawyers ("NACDL") submits this brief in support of petitioner Stacey C. Koon's appeal seeking reversal of the decision of the Court of Appeals for the Ninth Circuit reversing the sentence imposed by the district court and seeking reinstatement of that sentence. This brief primarily addresses the standard of appellate review of a district court's decision to depart from the United States Sentencing Guidelines (the "Guidelines") in the "unusual" or "atypical" case. While the NACDL does not condone the activities for which petitioner Stacey C. Koon was charged and convicted, it believes that he, like any other citizen, is entitled to elemental fairness in the application of the law.

The NACDL is a national organization of over 8,000 criminal defense attorneys who practice in the federal and state courts. Its members come from every state in the United States, as well as from Puerto Rico, the Virgin Islands, Guam and several foreign countries. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. The NACDL is a non-profit association which was formed in 1958 exclusively for charitable, scientific, educational and legislative purposes. Among other things, the NACDL seeks to promote the study of and research in the field of criminal defense law and procedure and constitutional law, to advance the knowledge of the law as it relates to the practice of criminal defense, to promote the proper and fair administration of criminal justice, to preserve, protect and defend the adversary system of justice and the Constitution,

to maintain and foster an independent and able criminal defense bar, and to ensure justice and due process for persons accused of committing crimes. Among its various activities, the NACDL files *amicus curiae* briefs in courts nationwide in cases of importance to the fair and evenhanded administration of justice.

The primary interest of the NACDL as *amicus curiae* in this case is the issue of the appropriate standard of appellate review of a sentencing court's decision to depart from the Guidelines on the ground that unusual circumstances exist such that the particular case falls outside the "heartland" of typical cases embodying the conduct that each guideline describes. The NACDL urges the Court to establish a uniform standard of limited appellate review that will give substantial deference to a sentencing court's decision that circumstances exist that are of a "kind" or "degree" that warrant a departure from the Guidelines offense level otherwise applicable. *See* 18 U.S.C. § 3553(b). The NACDL further urges the Court to hold squarely that the sentencing court may base a departure on a determination that the totality of the circumstances makes the case "atypical" even if none of the considered factors alone would make the case so "unusual" that a departure would be justified. *See* U.S.S.G. § 5K2.0, comment. (combination of factors may take the case out of the heartland even if none individually would distinguish the case).



The written consent of both parties to this case, petitioner Koon and respondent United States, has been obtained for the filing of this petition.[1]

## A LIMITED STANDARD OF APPELLATE REVIEW SHOULD BE APPLIED TO A DISTRICT COURT'S DEPARTURE BASED UPON A FINDING OF AN ATYPICAL CASE

The Ninth Circuit's decision to vacate the district court's downward departures in this case is based upon an impermissibly restrictive view of a sentencing court's authority to depart from the Guidelines. While the NACDL realizes that under the Guidelines the district court should not have unfettered discretion in applying the Guidelines with respect to departures, it does believe that district courts should retain, at a minimum, the degree of flexibility suggested by *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993) (Breyer, J.). Thus, the NACDL urges a standard of limited appellate review that will pay substantial deference to a sentencing court's determination of "'unusualness' with 'full awareness of, and respect for, the trier's superior "feel"' for the case." *United States v. Rivera*, 994 F.2d at 952 (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir.), *cert. denied*, 493 U.S. 862, 110 S. Ct. 177 (1989)); *see also United States v. Broderson*, 1995 WL 574770, at *6 (2d Cir. Sept. 29, 1995) (adopting the *Rivera* analysis). *But see United States*

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[1] Accompanying this brief are Letters from Drew S. Days, III, Solicitor General, on behalf of the government, and Theodore B. Olson of Gibson, Dunn & Crutcher, on behalf of petitioner Koon, consenting to the filing of a brief *amicus curiae* by the NACDL.

*v. Goff*, 20 F.3d 918, 920 n.1 (8th Cir. 1994) (Eighth Circuit has not adopted *Rivera* standard that gives "greater deference 'to sentencing court determination of whether (and the extent to which) given circumstances make a case "unusual" or "not ordinary."'")

The district court's familiarity with and "superior feel" for the particular case before it calls for the adoption of a narrow scope of appellate review of a sentencing court's departure decision. This same rationale underlies the widely-accepted standard of limited review of a district court's evidentiary decisions and a magistrate's probable cause determinations with respect to a warrant application. Just as a district court's decisions involving evidentiary matters are given "substantial deference" by an appellate court because it, as opposed to the appellate court, has a better "feel" for the case from having participated in the proceedings that moved step-by-step toward the decision that prompted the challenge on appeal, so too does a district court have a "superior feel" for an "unusual" or "atypical" case with respect to sentencing. *See, e.g., Bradley v. Secretary of Dept. of Health & Human Services*, 991 F.2d 1570 (Fed. Cir. 1993) (fact-finder has broad discretion in evidentiary determinations); *May v. Arkansas Forestry Com'n*, 993 F.2d 632, 637 (8th Cir. 1993) (appellate court must give "substantial deference" to district court's evidentiary rulings); *Gracia v. Lee*, 976 F.2d 1344, 1345 (10th Cir. 1992) (district court accorded "considerable deference" in evidentiary matters); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991) (district court accorded "great discretion" in evidentiary rulings); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 601 (9th Cir. 1991) ("broad discretion" accorded district court's evidentiary determinations).



Certainly, an appellate court should accord a sentencing court at least as great deference regarding its determination of whether to depart from the Guidelines -- a generally non-constitutional decision -- as a reviewing court gives to a magistrate judge's determination of a constitutional issue concerning the basis for the issuance of a search warrant. *United States v. Leon*, 468 U.S. 897, 913, 104 S. Ct. 3405, 3416 (1984) (recognizing that a magistrate's determination of probable cause should be paid "great deference" by reviewing courts); *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983) ("magistrate's 'determination of probable cause should be paid great deference by reviewing courts'"); *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 590-91 (1969) ("in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense . . . [and] their determination of probable cause should be paid great deference by reviewing courts" (citations omitted)). Indeed, a sentencing court's knowledge of and feel for the case before it is far greater than that of a magistrate judge called upon to determine whether probable cause exists sufficient for the issuance of a search warrant. While an issuing magistrate judge typically makes an immediate, hurried determination regarding a citizen's constitutional right to be free from unreasonable searches and seizures by the state based on facts within the four corners of an affidavit before him or her, a sentencing court's determination of an appropriate sentence under the Guidelines in a particular case is, even if the case is settled without a trial, a thoughtful decision based upon personal observations of the defendant and the opportunity to read and consider the written and sometimes oral submissions from defense counsel, the prosecutor, the Probation Department, the victim, and relevant medical or psychiatric experts. Further, probable cause is a largely legal

determination made in a comparative vacuum based upon the facts in the supporting affidavit in issue, and thus is easily subject to reconsideration by a reviewing court with the benefit of input from the parties and an opportunity to research and consider the issues.

As the *Rivera* Court recognized, a sentencing court has greater competence and expertise in determining whether the particular case before it is "unusual" or "atypical" than does an appellate court because the sentencing court is "likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal." *Rivera*, 994 F.2d at 951. As one reviewer has observed, appellate court judges "no longer look defendants in the eye, study presentence reports, or struggle with assessing whether an offender is beginning or ending a criminal career, appears to be dangerous or harmless, is a minnow in a sea of big fish, or has gone astray under unusually stressful circumstances and will not offend again," and that they "no longer see large numbers of worried or stunned faces, or multiple defendant cases covering the full range of criminal responsibility." Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on The Discretion of Sentencers*, 101 Yale L.J. 1681, 1728 (1992). The deference that should be accorded a sentencing court's decision on departure matters in an unusual case is simply an acknowledgment that district courts generally are in the best position to recognize atypical cases. *See Rivera*, 994 F.2d at 950. Thus, it is the sentencing court's unique position -- its experience and special competence with respect to the particular case -- that permit it to impose a just and equitable sentence, the goal of the Sentencing Commission in formulating the Guidelines. *Rivera*, 994 F.2d at 951-52.



## AN APPELLATE COURT REVIEW SHOULD ACCORD SUBSTANTIAL DEFERENCE TO A SENTENCING COURT'S DETERMINATION THAT A CASE IS ATYPICAL BASED UPON EITHER A SINGLE FACTOR OR A COMBINATION OF FACTORS

The NACDL supports a deferential standard of limited appellate review rather than a more rigid standard that would have the effect of placing a "straitjacket" on a sentencing court, "compelling it to impose sentences like a robot inside a Guidelines' glass bubble, preventing it from exercising discretion, flexibility or independent judgment.'" *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1991) (quoting *United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990)).

In its support of a limited scope of appellate review, the NACDL does not contend that the standard suggested by *Rivera* is necessarily the one that the Court should adopt. It does believe, however, that the limited scope of review suggested by *Rivera* properly recognizes the experience and special competence of sentencing courts to view the particular factors in each case in terms of the gestalt of the entire case. *Rivera*, 994 F.2d at 951-52 (under the *Rivera* analysis, departures may be "encouraged" where the Guidelines specifically list factors to be considered for departure purposes, or "discouraged" where the factors were taken into account by the Sentencing Commission but are present in such an unusual kind or degree as to take the case out of the "heartland," or "forbidden" where the factors in question are prohibited from consideration).

While it may be that a district court has no special expertise in determining whether a factor is "forbidden," "encouraged" or "discouraged" under the Guidelines, it plainly has special expertise when determining whether and

to what extent the given circumstances make the case unusual or atypical. *See Rivera*, 994 F.2d at 951-52. Thus, a district court's determination that the case before it is unusual or not ordinary based upon the existence of a factor or factors of a kind or degree not adequately considered by the Sentencing Commission should be paid great deference by an appellate court. As the court observed in *Rivera*, extending such respect to a sentencing court's departure decision is consistent with the Supreme Court's statement that,

> except to the extent specifically directed by statute, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence."

*Williams v. United States*, 503 U.S. 193, 112 S. Ct. 1112, 1121 (1992) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n. 16, 103 S. Ct. 3001, 3009 n.16 (1983)). A less restrictive standard of review would result in an appellate court simply substituting its judgment for that of the sentencing court. *Rivera*, 994 F.2d at 952.[2]

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[2] As noted by *Rivera*, extending respect for sentencing court determinations of whether the case is atypical also would be consistent with Congress' instruction that appeals courts "shall affirm" reasonable departures, 18 U.S.C. § 3742(f)(2)-(3), and with "appellate court efforts generally to conduct judicial review in light of comparative institutional competence. *Rivera*, 994 F.2d at 952 (citing "*United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989) (deferential review under Guidelines where issue is 'one that is founded "on the application of the fact finding tribunal's experience

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A sentencing court should be bale to rely on a combination of factors, even though none of them standing alone would support a departure when they together create a circumstance that takes the case out of the heartland. *See United States v. Broderson, supra*, at *6 (departure based upon a combination of discouraged factors). Often it is the totality of the circumstances and the interplay between and among the factors that make the case unusual, not the individual factors standings alone. As Circuit Judge Reinhardt observed below: The principle underlying combination departure cases "is rooted in the common sense maxim that the whole is greater than the sum of its parts" and that "it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decisions." *United States v. Koon*, Nos. 93-50561, 50608, 50562, 50609 (9th Cir. Feb. 2, 1995) (Reinhardt, Circuit Judge, dissenting) (Appendix, at 80a, 84a). *See also* U.S.S.G. Ch. 1, Pt. A intro. comment. (4)(b); 18 U.S.C. § 3553(b).

In reviewing a sentencing court's departure decision in a combination case, an appellate court's inquiry should be limited, first to whether the sentencing court relied upon a forbidden factor as a basis to depart from the otherwise applicable guideline range, and, second, whether the court's departure lacks sufficient grounds so that it constitutes an abuse of discretion. If the departure is not grounded upon an impermissible factor or an abuse of

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> with the mainsprings of human conduct"'") (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) *cert. denied*, 469 U.S. 825, 105 S. Ct. 101)."

discretion, the appellate court should defer to the district court's view of the unusual nature of the case, even if the factors relied upon are discouraged, rather than encouraged or unconsidered, under the Guidelines. *See United States v. Broderson, supra,* at *6 (appellate court deferred to the district court's determination of unusualness based upon a combination of discouraged factors even though it might not have issued a departure); *see also* U.S.S.G. § 5K2.0, comment. (combination of characteristics or circumstances may take the case out of the "heartland" "even though none of the characteristics or circumstances individually distinguishes the case").

## THE SENTENCE IMPOSED BY THE DISTRICT COURT SHOULD BE REINSTATED

In this case, the Ninth Circuit erred in two respects: It failed to apply the appropriate limited scope of review to the district court's sentencing determination and it failed to consider the totality of the circumstances created by a combination of factors that makes the case "unusual" or "not ordinary." While the court did pay lip service to a somewhat deferential standard of review, it essentially substituted its own judgment for that of the district court as to the appropriate sentence for petitioner. Thus, the court failed to give proper deference to the district court's superior "feel" for what it considered an unusual or non-heartland case.

Further, the court erred in its methodology of dissecting each component part of the total circumstances which take the case out of the heartland and assessing whether each factor individually and standing alone would support a departure. The court did not utilize, as it should have utilized, a totality of the circumstances test. *See* U.S.S.G. § 5K2.0, comment. ("The Commission does not foreclose the possibility of an extraordinary case, that because of a



combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case."); *United States v. Broderson, supra,* at *6, n.1 (citing U.S.S.G. § 5K2.0, comment.).[3] Cf. *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405 (1984) (applying totality of the circumstances test to issuance of search warrant); *Neil v. Biggers,* 409 U.S. 188, 198-99, 93 S. Ct. 375 (1972) (applying totality of circumstances test to in-court identification of defendant). As Circuit Judge Reinhardt observed, the appellate panel "assessed each of the factors independently and concluded that in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor -- notwithstanding the fact that none of them was a prohibited factor" -- which method of review "would essentially eliminate departures based on a combination of factors" because "[n]o combination departure could survive this divide and conquer method of review." *United States v. Koon,* Nos. 93-50561, 93-50608, 93-50562, 93-50609 (9th Cir. Feb. 2, 1995 (Reinhardt, Circuit Judge, dissenting) emphasis in original) (Appendix, at 84a.)

Had the Ninth Circuit applied a standard of review "extend[ing] 'respect' to [the] sentencing court determinations of whether (and the extent to which) given circumstances make [the] case ['unusual' or 'not

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[3] Although U.S.S.G. § 5K2.0, comment, became effective on November 1, 1994 (see appendix C, amendment 508 of the 1994-95 Manual), the amendment, we submit, merely clarified what was, and should have been, the existing law.

ordinary,'" *Rivera*, 994 F.2d at 952, and a totality of the circumstances test, we submit, the court would have affirmed the district court's three-level downward departure based upon a combination of factors. Ultimately, it should be left to the sentencing court, absent an abuse of discretion, to determine "whether the given circumstances, as seen from [its own] unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent." *Rivera*, 994 F.2d at 951.

## THE FACTORS RELIED UPON BY THE DISTRICT COURT JUSTIFIED THE DOWNWARD DEPATURE IN THIS CASE

The NACDL further believes that certain of the factors relied upon by the sentencing court in combination for the three-level downward departure by themselves would justify a downward departure. The district court found that the defendant would suffer "additional punishment" in that he would be subjected to administrative proceedings resulting in the loss of employment and tenure and he would be vulnerable to abuse in prison because of his occupation and the notoriety of the case.[4] (Appendix, at

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[4] The district court properly considered petitioner's vulnerability to additional punishment while incarcerated based upon the unique circumstances of the case. While the Ninth Circuit agreed that vulnerability to abuse may justify a departure in some cases (Appendix, at 64a-65a), it disagreed that this is such a case. In so doing, it merely substituted its judgment for that of the district court. Although the NACDL does not suggest a blanket rule that all police officers sentenced to incarceration in federal prison are vulnerable to abuse or that every case involving a police officer sentenced to prison is "atypical" so that a downward departure should

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58a-66a.) We submit that a sentencing court should be permitted to consider additional punishment, standing alone, when that circumstance is of a kind or degree not adequately considered by the Sentencing Commission when formulating the Guidelines. Loss of employment, tenure and a substantial pension are examples of additional punishment that may provide a basis for departure in an unusual case.

The penological purposes of sentencing include punishment, 18 U.S.C. § 3553(a)(2)(A). Loss of employment, tenure and pension rights are severe punishments, in some instances perhaps even greater than a prison sentence and fine. When a defendant receives an extraordinarily severe additional punishment, a district court judge might well determine that such additional punishment justifies some reduction in the presumed Guideline sentence so that a downward departure is necessary in order to ensure that the <u>total</u> punishment imposed upon the defendant is not unduly or disproportionately harsh.

Such an approach is consistent with the Guidelines goal that there be little or no disparity in punishment between two similarly situated individuals convicted of similar criminal conduct. U.S.S.G. Ch. 1, Pt.A(3). For instance, in the case of an attorney who is disbarred upon his or her

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be granted, we do believe that there are special situations, as the court found here, that make a prisoner especially vulnerable so that a downward departure is justified. *See United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990).

conviction with another defendant of felony assault on a federal officer (even though the crime was wholly unrelated to the practice of law), the court, in a proper exercise of its discretion, might downwardly depart in the case of the attorney. If the two defendants are convicted of the same crime, under the same circumstances, but only the attorney will suffer the severe punishment of the loss of a hard-earned professional license and the attendant means of livelihood, while the other will return to the work force with no such penalty, the court, we submit, should be permitted to consider that collateral consequence when making a departure determination so as to reach a fair and adequate punishment for the attorney which might be less in prison time, but equal or greater overall, than the punishment imposed upon the co-defendant.[5]

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[5] Similarly, a court should be able to consider deportation following incarceration as a basis for departure as an additional punishment. We submit that there is nothing in the Guidelines or commentary to indicate that the Sentencing Commission adequately considered deportation of a resident alien because of a conviction as a basis for a departure. *But see United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993) (fact that defendant would be deported following term of incarceration did not warrant downward departure).

Another example of an additional punishment that might provide a proper basis for a downward departure might be in a situation where a civil judgment, including an award of punitive damages, is awarded to the victim of the crime. Such additional punishment might provide grounds for a downward departure as to the fine imposed, for instance. See U.S.S.G. § 5E1.2, comment. note, appendix E (most frequently asked questions), question number 116.



Another factor relied upon by the sentencing court is the "spectre of unfairness" with respect to the successive state and federal prosecutions under the "dual sovereignty" doctrine[6] (Appendix, at 68a). The NACDL believes that the district court properly considered the successive prosecutions as a factor when determining to depart downward. Even if the district court could not consider the fact that petitioner was tried and acquitted in a similar state prosecution as a bar to the federal prosecution, it should be permitted to consider the prior prosecution as a factor mitigating the punishment. The district court properly found that there is a spectre of unfairness in subjecting a person to a lengthy criminal prosecution in state court in which he was acquitted, thereby permitting him to obtain some relief in the form of a sense of repose, and then subjecting him to the trauma of a second trial by prosecuting him in the federal arena for the same conduct.

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[6] Whether the dual sovereignty exception to the Double Jeopardy Clause is still viable has been questioned recently by the Second Circuit. *See United States v. All Assets of G.P.S. Automotive Corp.*, Slip Op. No. 94-6115, at 7495 n.8 (2d Cir. Sept. 18, 1995) (questioning the viability of the dual sovereignty doctrine since the Supreme Court has not had occasion to apply the doctrine in the context of successive state-federal prosecutions since the Double Jeopardy Clause of the Fifth Amendment was found applicable to the states and noting that "[s]imilar doctrines premised on distinctions between federal and state sovereignty that had developed in connection with the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment were eliminated after these constitutional provisions were held applicable to the states").

In some situations, the Sentencing Commission has recognized that factors that do not rise to a complete defense to a charge, such as duress, may nevertheless justify a downward departure. *See* U.S.S.G. §§ 5K2.12 (duress or coercion), 5K2.13 (diminished capacity), 5G1.3, comment. n.2 (relevant conduct). Indeed this Court has recognized that the harshness of the result in a case implicating double jeopardy concerns but not dismissable on double jeopardy grounds might be amerliorated by a downward departure. *Witte v. United States*, -- U.S. --, 115 S. Ct. 2199, 2208-09 (1995).

The district court also departed downward five levels based upon a finding that the victim's wrongful conduct contributed significantly to provoking the defendant's offense behavior. (Appendix, at 70a.) The NACDL believes that the sentencing court correctly determined that the victim provocation departure was applicable in this case. *See* U.S.S.G. § 5K2.10 ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense."). As a matter of law, contrary to the appellate court's interpretation of the Guidelines section, the victim provocation departure is applicable to this case, inasmuch as the Guidelines do not exclude police officers as a class from the application of the victim provocation departure. *See* U.S.S.G. § 5K2.10. Indeed, there are no exceptions to the application of the victim's conduct departure. The Sentencing Commission simply states that this departure might not be appropriate in cases involving sexual abuse or non-violent crimes. *See* U.S.S.G. § 5K2.10, comment.

Further, the court of appeals appeared to confuse provocation with justification. Unlike justification, which



might be a complete defense to criminality because some mental or psychological condition blocks the formation of the requisite criminal intent, *see Tison v. Arizona*, 456 U.S. 107, 133, n.40, 102 S. Ct. 1558, 1574, n.40 (1982) (noting various justification defenses under various state laws), *United States v. Erskine*, 588 F.2d 721 (9th Cir. 1978), provocation is merely a mitigating circumstance recognizing that there is less venality on the part of a defendant provoked into committing a wrongful act than one who acts without any provocation.

The circuit court's seeming belief that provocation can be easily terminated defies human nature. Provocation, like entrapment, exists in a continuum -- it does not necessarily stop merely because the instigator ceases to act. *See Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535 (1992) (finding entrapment as a matter of law even though defendant at time of crime, but not time of initial contact with government agents, was predisposed to commit crime). In both situations, one's will or ability to conform to the law can be overcome by another's misconduct. Once provoked, or once entrapped, the defendant's state of mind has been altered, sometimes irretrievably. Except perhaps where there is some significant attenuation, the provocation provides the impetus for a defendant's acts, even if the acts go beyond legitimate means. Thus, provocation as a mitigating factor should not be limited temporally to activities prior to or just following the termination of the provoking conduct, but rather only when there is no causal connection between the provocation and the crime.

For example, if a federal corrections officer were to constantly taunt a prisoner with racial slurs and physically provocative conduct, and then one day the prisoner, although not taunted that day, in fury and retaliation strikes the guard, the prisoner's conduct, while clearly wrongful

and not legally justified, might be considered for Guidelines purposes the result of provocation. The sole example given in U.S.S.G. § 5K2.10 itself suggests that earlier provocation might mitigate a crime so that a downward departure is warranted. *See* U.S.S.G. § 5K2.10, comment. The example states "an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation." Certainly, this example is not limited to situations where the defendant steals or destroys property contemporaneously with or immediately after the provocation.

In sum, the NACDL believes that an appellate court should give due respect to a sentencing court's departure decision "in a spirit of humility occasioned by not having participated in what has gone before." *Founding Church of Scientology of Wash. D.C., Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir.) (applying discretionary standard to district court's evidentiary decisions), *cert. denied*, 484 U.S. 871, 108 S. Ct. 199 (1986). As the title "Guidelines" itself implies, the Guidelines should be a guide, not a set of commandments, for the sentencing court to follow when determining the appropriate sentence. The NACDL supports a uniform discretionary standard of limited appellate review of departure decisions, which would be consistent with the spirit and the letter of the Guidelines.

## CONCLUSION

For the foregoing reasons, the NACDL respectfully requests that the Court reverse the Court of Appeals for the Ninth Circuit and, in so doing, establish a uniform standard of limited appellate review of district court decisions to depart from the Guidelines in the "unusual" or "atypical" case based upon a single factor or a combination of factors.



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Respectfully submitted,

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